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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8 The Honorable Stanley A. Bastian

9 United States of America,

10 Plaintiff,

11 v.

12 David Elmo Curry,

13 Defendant.

14 No. 1:21-CR-2053-SAB
15 Motion for Judgment of
16 Acquittal and Motion for New
17 Trial

18 Without Oral Argument
19 March 18, 2024, 6:30 p.m.

20 David Elmo Curry hereby moves this Court for a judgment of
21 acquittal under Federal Rule of Criminal Procedure 29 because the
22 evidence at trial was insufficient to sustain his convictions on both Count
23 1 and Count 2, Attempted Enticement of a Minor.¹ Additionally, Mr.
24 Curry moves for a new trial in the interest of justice under Federal Rule
25 of Criminal Procedure 33 because justice requires such. Mr. Curry's
motions are timely.²

¹ See ECF 1; ECF 105.

² Fed. R. Crim. Pro. 29(a), (c); Fed. R. Crim. Pro. 33(b)(2); ECF No. 112.

Applicable Law—Motion for a Judgment of Acquittal

Pursuant to Rule 29(a), “...the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.”³ The Court must view the evidence in a light most favorable to the government and determine whether any “rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁴ With regard to the credibility of witnesses and conflicting evidence, the Court should assume the jury “resolve[d] all such matters in a manner which would support the verdict.”⁵

Applicable Law—Motion for a New Trial

Following trial, the Court may vacate a jury's guilty verdict and order a new trial "if the interest of justice so requires."⁶ "A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal."⁷ Specifically, the Court "need not view the evidence in the light most favorable to the verdict" when

³ Fed. R. Crim. Pro. 29(a)

⁴ *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

⁵ *United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir. 1969).

⁶ Fed. R. Crim. Pro. 33(a).

⁷ *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992).

ruling on a motion for a new trial.⁸ Additionally, the Court “may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses.”⁹ After evaluating the evidence for itself, if the Court feels “the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury” even if the evidence is otherwise sufficient to sustain the verdict.¹⁰

Argument

The United States charged Mr. Curry in a two-count indictment with Attempted Enticement of a Minor.¹¹ For both Counts 1 and 2, the plaintiff had to prove the following elements beyond a reasonable doubt:

“A §2422(b) attempt conviction requires proof of the following beyond a reasonable doubt: the defendant must have “knowingly (1) attempted to (2) persuade, induce, entice, or coerce (3) a person under 18 years of age (4) to engage in sexual activity that would constitute a criminal offense.”

⁸ *Alston*, 974 F.2d at 1211 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

⁹ *Alston*, 974 F.2d at 1211 (quoting *Lincoln*, 630 F.2d at 1319).

¹⁰ *Alston*, 974 F.2d at 1211-12 (quoting *Lincoln*, 630 F.2d at 1319).

¹¹ See ECF 1.

1 *United States v. Eller*, 57 F.4th 1117, 1119 (2023).¹²

2 Furthermore, because it is an attempt crime,

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4 “An attempt conviction requires evidence that the defendant
5 intended to violate the statute and took a substantial step toward
6 completing the violation. To constitute a substantial step toward
7 the commission of a crime, the defendant’s conduct must (1)
8 advance the criminal purpose charged, and (2) provide some
9 verification of the existence of that purpose. Moreover, a
10 defendant’s actions must cross the line between preparation and
11 attempt by unequivocally demonstrating that the crime will take
12 place unless interrupted by independent circumstances.”

13 *United States v. Eller*, 57 F.4th 1117, 1119-20 (2023).¹³

14 Count 1 and Count 2 presented unique challenges. For the
15 following reasons, both counts failed to meet the sufficiency of evidence
16 standard required to sustain a guilty verdict.

17 **Count 1**

18 In Count 1, the government presented evidence that on November
19 16, 2019, Mr. Curry responded to a Craigslist online advertisement via
20 email.¹⁴ The advertisement was part of the Netnanny Sting operation.
21 Detective Makayla Morgan of the WSP was acting in an undercover

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24 ¹² *United States v. Eller*, 57 F.4th 1117, 1119 (2023), citing *United States v. McCarron*, 30 F.4th
25 1157, 1162 (9th Cir. 2022).

¹³ *United States v. Eller*, 57 F.4th 1117, 1119-20 (2023) (internal quotations and citation
omitted).

¹⁴ See ECF No. 103-1; Plaintiff’s Exhibit 13.

1 capacity as Kelli Morton. Detective Morgan presented herself as a
2 mother with two minor daughters and engaged in emails and text
3 messages with Mr. Curry. The entirety of the messages between Mr.
4 Curry and Detective Morgan were presented and admitted into evidence
5 at trial.¹⁵

6
7 Nowhere in the email chain or text chain between Detective Morgan
8 and Mr. Curry does Mr. Curry ever use an instrument of interstate
9 commerce to attempt to persuade, induce, entice, or coerce a Minor to
10 engage in sexual activity constituting a criminal offense. In fact, Mr.
11 Curry never communicates directly (or indirectly) with a (real or
12 fictional) minor during Count 1. Nor does Mr. Curry ever use an adult
13 intermediary to communicate indirectly with a (real or fictional) minor.
14 And while it is possible for an adult intermediary to violate the statute
15 the facts in this case are not sufficient to meet that situation. Detective
16 Morgan is never used in any manner to communicate with the minors at
17 the direction of Mr. Curry.

18
19 For example, in *United States v. Eller*, an adult intermediary was
20 used to negotiate a sexual transaction with minors violating the
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25¹⁵ See Exhibits 104 & 105.

1 statute.¹⁶ In *Eller*, the defendant made unequivocal and repeated
2 requests insisting that children appear in the sexually explicit livecam,
3 videos, and photos.¹⁷ The defendant detailed the sexual acts that they
4 should perform and haggled over price.¹⁸ The defendant negotiated that
5 minor children be used (as opposed to adults) and threatened to walk-
6 away from the transaction when the intermediary initially declined the
7 request.¹⁹ The defendant wired a Western Union transaction for \$90
8 upon agreement.²⁰

11 The defendant engaged in multiple exchanges with the
12 intermediary.²¹ The defendant repeatedly asked questions about the
13 children's ages, made requests for children as young as 5 years old to
14 participate, and described the sexual acts that he wanted performed.²²
15 This request included a request for sexual activity that would cause
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22¹⁶ *United States v. Eller*, 57 F.4th 1117 (2023).

23¹⁷ *United States v. Eller*, 57 F.4th 1117, 1119 (2023).

24¹⁸ *United States v. Eller*, 57 F.4th 1117, 1119 (2023).

25¹⁹ *United States v. Eller*, 57 F.4th 1117, 1119 (2023).

²⁰ *United States v. Eller*, 57 F.4th 1117, 1119 (2023).

²¹ *Id.*

²² *Id.*

1 "marks from the pain."²³ The defendant sent money on at least four
2 separate occasions.²⁴

3 Mr. Curry's case regarding Count 1, presents the opposite scenario.
4 In Mr. Curry's case, at all times Mr. Curry followed the lead of Detective
5 Morgan. For example, Mr. Curry responded to the ad asking Detective
6 Morgan what she was looking for, with the idea of paying the adult
7 woman for sex.²⁵ It is Detective Morgan that requested that Mr. Curry
8 have sexual activity with minors. Mr. Curry never made that request of
9 Detective Morgan. Mr. Curry never requested that Detective Morgan
10 allow him to have sexual activity with her daughters. It was always
11 Detective Morgan that steered Mr. Curry to her daughters.²⁶

12 Additionally, Mr. Curry's response to Detective Morgan's request
13 that Mr. Curry help teach her girls what her and her sister had been
14 taught, was that it was not something that he had done before but that

22
23 ²³ *Id.*

24 ²⁴ *Id.*

25 ²⁵ See Gov'ts Ex. 13, Bates 158. "I'm male. 34 chubby what are you looking for?" and
26 "....Basically you need extra cash for the holidays and willing to have sex with me?
Cause if so I would be interested in that....."

²⁶ See Exhibits 104 & 105.

1 he was willing to help out.²⁷ Mr. Curry did not offer or negotiate payment
2 for sexual activity with the minor children. Detective Morgan asked Mr.
3 Curry what he was comfortable with and stated what she was
4 comfortable with setting the limits and parameters.²⁸ Detective Morgan
5 insisted on condoms and requested that Mr. Curry bring condoms and
6 lubricant.²⁹ When Mr. Curry showed up to the residence he continued to
7 follow Special Agent Hart's directions. Mr. Curry never made any
8 movement that was not at the direction of either Detective Morgan or
9 Special Agent Hart. As Special Agent Hart testified in trial, once in the
10 house, Mr. Curry in no way attempted to communicate with the pretend
11 children.³⁰

12
13 In sum for Count 1, in no way did Mr. Curry ever use an instrument
14 of interstate commerce to communicate with a minor in an effort to
15 persuade, entice, induce, or coerce a minor to engage in criminal sexual
16 activity.

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23 ²⁷ See Gov'ts Ex. 13, Bates 159 (13-002). "...honestly im looking for someone to help
24 teach my girls like my dad taught my sister and I he started when we were 3 and 4...."
25 And "It is not something I have done before. I am willing to help you out...."

²⁸ See Ex. 105, Bates 87.

²⁹ See Ex. 105, Bates 87-88.

³⁰ See ECF No. 14 at pg. 13 of 199.

1 Mr. Curry's case is distinguishable from *Eller* and is more
2 analogous to *United States v. Nitschke*.³¹ In *Nitschke*, the detective
3 acting in an undercover capacity was monitoring a social-networking
4 site.³² The defendant responded to the detective's suggestive profile, and
5 they engaged in a private online chatroom chat.³³ The two engaged in a
6 chat in which the detective offered for the defendant to join him, for his
7 scheduled meeting, at his residence for sex with his 13 year old "lil perv
8 boy."³⁴ They discussed what they were comfortable with and willing to
9 do.³⁵ The defendant only had contact with the detective and similar to
10 Mr. Curry did not use the detective as an intermediary to attempt to
11 persuade, induce, entice, or coerce the pretend minor to engage in
12 criminal sexual activity.³⁶ The defendant and detective discussed a
13 rendezvous point via text message and the defendant was arrested after
14 arriving at the pre-arranged address.³⁷

22 ³¹ *U.S. v. Nitschke*, 843 F.Supp.2d 4 (2011).

23 ³² *U.S. v. Nitschke*, 843 F.Supp.2d 4, 6 (2011).

24 ³³ *U.S. v. Nitschke*, 843 F.Supp.2d 4, 6 (2011).

25 ³⁴ *U.S. v. Nitschke*, 843 F.Supp.2d 4, 6 (2011).

³⁵ *Id.*

³⁶ *Id.* at 6-7.

³⁷ *Id.* at 7.

1 The Court first focused on “whether a reasonable juror could find,
 2 under the stipulated facts, that Defendant *intended* to persuade or entice
 3 a minor in his internet chat.”³⁸ The Court noted as an initial matter that
 4 the criminal intent criminalized by § 2422(b) is the intent to persuade,
 5 induce, entice, or coerce a minor, not the intent to have sex with a
 6 minor.³⁹ Furthermore, the Court analyzed that the intent to persuade
 7 must be an intent to persuade using a means of interstate commerce.⁴⁰

8 The Court further stated,

9 “As the Eleventh Circuit explained, “Combining the definition of
 10 attempt with the plain language of § 2422(b), the government
 11 must first prove that [defendant], *using the internet*, acted with
 12 the specific intent to persuade, induce, entice, or coerce a minor to
 13 engage in unlawful sex.” The statute thus does not criminalize an
 14 intent to persuade at some later point in person.”

15 *U.S. v.Nitschke*, 843 F.Supp.2d 4, 11 (2011).⁴¹

16 The Court answered this initial question by holding:

17 “Given these legal requirements, the undisputed facts here do not
 18 establish an intent to persuade, induce, entice, or coerce a minor
 19 using a means of interstate commerce. First, there are no facts
 20 that prove—and the government does not even argue—that
 21 Defendant intended to *directly* persuade a minor through means
 22 of interstate commerce. As the chat transcripts make clear,

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 24 ³⁸ *Id.* at 10. (emphasis in original)

25 ³⁹ *Id.* at 11.

40 ⁴⁰ *Id.* at 11.

41 ⁴¹ *Id.* at 11. (internal citations omitted)

1 Defendant only communicated with Detective Palchak who never
2 stated or implied that he was anything other than an adult. The
3 question, therefore, is whether Defendant intended to *indirectly*
4 persuade a minor through Palchak. The undisputed facts show he
5 did not.”

6 *U.S. v. Nitschke*, 843 F.Supp.2d 4, 11 (2011).⁴²

7 The Court addresses other circuits, cases on the issue and
8 establishes the idea that “the defendant’s persuasion must affect the
9 minor, even if indirectly. In other words, the defendant must in essence
10 be asking the adult to persuade the minor, thereby constituting indirect
11 persuasion.”⁴³ The Court notes, “The theory behind these cases is that
12 the defendant’s communications through the adult intermediary sought
13 to cause the assent of the minor to the defendant’s proposals. The focus
14 is on the intent of the defendant through his communications to influence
15 the child’s assent. Given the undisputed facts here, no reasonable juror
16 could find that Defendant intended to cause the minor to assent.”⁴⁴

17 The Court also addressed the issue of a substantial step.⁴⁵ The
18 Court noted that “[a] substantial step towards violating § 2422(b) must
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24 ⁴² *Id.* at 11. (emphasis in original)

25 ⁴³ *Id.* at 12. (internal citations omitted)

26 ⁴⁴ *Id.* at 13.

27 ⁴⁵ *Id.* at 14-15.

1 necessarily be a step towards persuading, enticing, inducing, or coercing
 2 a minor via means of interstate commerce.”⁴⁶ The Court looked at the
 3 defendant’s communications by themselves and noted that “there is
 4 similarly nothing to show a substantial step in enticing a minor.”⁴⁷ In
 5 disagreement with the Ninth Circuit, was not persuaded by *United*
 6 *States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004), and concluded that,
 7

9 “The analysis of the travel in these cases is neither binding on this
 10 Court nor persuasive. First, only *Kaye* suggests that travel by
 11 itself may constitute a substantial step, but that court never
 12 actually had to decide. In fact, every case cited by the Government
 13 included communications that evidenced the defendant’s attempt
 14 to persuade. Second, and more fundamentally, travel ultimately
 15 has nothing to do with this crime. A § 2422(b) violation occurs, if
 16 at all, before any travel is undertaken; indeed, no travel is even
 17 necessary. The crime is complete with the persuasion or
 18 attempted persuasion, both of which are necessarily confined to
 19 the interstate communications between defendant and the minor
 20 or an adult intermediary. Travel for a face-to-face meeting thus
 21 cannot be a substantial step because such face-to-face persuasion
 22 is not criminalized.

23 As the Court finds that the undisputed facts demonstrate, as a
 24 matter of law, that Defendant did not take a substantial step
 25 towards violating § 2422(b), he could not have attempted to violate
 26 that statute.”

27 *U.S. v. Nitschke*, 843 F.Supp.2d 4, 15-16 (2011).⁴⁸

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Turning back to Mr. Curry's case. Mr. Curry made no communications neither directly nor indirectly with a minor. Nor did Mr. Curry communicate with the adult intermediary in an effort to persuade, induce, entice, or coerce the minors to assent to criminal sexual activity. In Count 1, Mr. Curry's travel does not amount to a substantial step as a matter of law. As such, Mr. Curry's Rule 29 motion as to Count 1 should be granted.

Count 2

In Count 2, the evidence showed sexually explicit communications via email and text message between Mr. Curry and Detective Dramis.⁴⁹ Detective Dramis was engaged in undercover work acting in the persona of a 13-year-old girl named Sunny. Mr. Curry testified to believing that he was communicating with an adult officer.⁵⁰ The communications started on December 12, 2019, when Detective Dramis responded to Mr. Curry's Doublelist! Ad.⁵¹ Mr. Curry's last communication with Detective

⁴⁹ See Exhibits 109 & 110.

⁵⁰ See ECF No. 115 at Bates 383 (pg. 22 of 116).

⁵¹ See Exhibit 103.

Dramis was on February 4, 2020.⁵² Detective Dramis's last attempt at communication with Mr. Curry was on April 17, 2020.⁵³

The testimony and evidence at trial showed discussions about multiple meet-ups between Mr. Curry and Detective Dramis both before and after Mr. Curry bought lubricant on December 30, 2019 at Castle Megastore.⁵⁴

The government presented the theory at trial, that Mr. Curry's purchase of the same flavor of lubricant on December 30, 2019, discussed previously in line with a discussed meet-up set for December 31, 2019, represented the substantial step toward committing the crime in Count 2. Finally, the government argued that the text message(s) sent by Mr. Curry to Detective Dramis that his mother was in the hospital so he could not make the meet-up was evidence that the crime would have been committed but for the interruption by these independent circumstances on December 31, 2019.⁵⁵

The jury convicted on this theory for Count 2.

⁵² See Exhibit 110 at Bates 65 (pg. 63 of 64).

⁵³ *Id.*; ECF No. 114 at Bates 317 (pg. 155 of 199).

⁵⁴ See Exhibit 110; ECF No. 114 at Bates 317-18 (pgs. 155, 156 of 199).

⁵⁵ See Ex. 110 at Bates 29. (pg. 27 of 64)

1 Under the circumstances, the evidence is not sufficient to support
2 this theory. As noted before, to support an attempt conviction, the
3 evidence must show that the defendant intended on violating the statute
4 and took a substantial step toward completing the violation.⁵⁶ “To
5 constitute a substantial step toward the commission of a crime the
6 defendant’s conduct must (1) advance the criminal purpose charged, and
7 (2) provide some verification of the existence of that purpose.”⁵⁷
8 Furthermore, mere preparation is not enough.⁵⁸ The defendant must
9 cross the line into unequivocally demonstrating that the crime will take
10 place unless interrupted by independent circumstances.⁵⁹

11 The testimony and evidence at trial showed that communication
12 between Mr. Curry and Detective Dramis continued for approximately
13 five additional weeks until Mr. Curry’s last response on February 4,
14 2020.⁶⁰ There was an additional 35 pages of text message
15 communications during that period of time.⁶¹ Additional meet-ups were
16 discussed with Mr. Curry making excuses throughout not to meet up with
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23 ⁵⁶ *United States v. Eller*, 57 F.4th 1117, 1119-20 (2023).

24 ⁵⁷ *United States v. Eller*, 57 F.4th 1117, 1119-20 (2023).

25 ⁵⁸ *Id.*

26 ⁵⁹ *Id.*

27 ⁶⁰ See Ex. 110 at Bates 65. (pg. 63 of 64)

28 ⁶¹ See Ex. 110 at Bates 30-65.

1 Sunny. There was no evidence of a lack of opportunity for Mr. Curry to
2 meet with Sunny. Based on that evidence, the purchase of lubricant by
3 Mr. Curry from Castle Megastore on December 30, 2019, can represent
4 no more than mere preparation.

5 The evidence, including Mr. Curry's testimony at trial, show that
6 Mr. Curry did not have the intent to persuade Detective Dramis into
7 having criminal sexual activity with him. The evidence reflects the fact
8 that Mr. Curry did not have the intent to persuade Detective Dramis
9 because he never had the intent to follow through with the actual sexual
10 activity. This is consistent with Mr. Curry's testimony at trial.
11 Therefore, the Court should grant Mr. Curry's Rule 29 motion in regards
12 to Count 2.

13 Therefore, in both counts, Mr. Curry's Motion for a Judgment of
14 Acquittal on Count 1 and Count 2 of the indictment should be granted.
15

16 **Interest of Justice**

17 Based on the argument above, if the Court were not to grant the
18 defendant's Rule 29 motion then it would be in the interest of justice to
19 grant the defendant's Motion for a New Trial pursuant to Rule 33.⁶²
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62 Fed. R. Crim. Pro. 29; Fed. R. Crim. Pro. 33.

1 Additionally, the defendant moves the Court to grant a Motion for a New
2 Trial for both counts pursuant to Rule 33(a).⁶³ It is in the interest of
3 justice for the Court to do so.
4

5 Prior to trial the defendant was excluded from presenting evidence at
6 trial related to his diagnosis of Autism Spectrum Disorder, level 1. Over
7 the defendant's objection, the Court granted the government's motion to
8 exclude Expert Testimony which precluded the defense from calling Dr.
9 Carter to testify in relation to Mr. Curry's mental defect (Autism
10 Spectrum Disorder, level 1). The defense was also prevented from Dr.
11 Carter testifying to testing she conducted showing a lack of a
12 predisposition to have sexual contact with minors. Dr. Carter's
13 testimony was relevant and necessary to support Mr. Curry's general
14 denial and entrapment defenses.
15

16 The jury did not hear testimony regarding Mr. Curry's autism.
17 Without this information they had an incomplete understanding of the
18 events that took place. Mr. Curry's autism impacts how he thinks,
19 communicates, and behaves. The jury needed Dr. Carter's expert
20 testimony to provide that context so that they could make an accurate
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⁶³ Fed. R. Crim. Pro. 33(a).

1 finding of guilt or innocence. Without that context and knowledge, they
2 were lacking material information, and were required to engage in the
3 fact-finding process based on an incomplete understanding of the
4 evidence.

6 Furthermore, Mr. Curry was precluded from arguing an entrapment
7 defense. This relieved the government of proving this element beyond a
8 reasonable doubt. Mr. Curry should have been free to present both a
9 general denial defense and an entrapment defense.⁶⁴ “As a general
10 proposition a defendant is entitled to an instruction as to any recognized
11 defense for which there exists evidence sufficient for a reasonable jury to
12 find in his favor.”⁶⁵ A defendant is legally permitted to present
13 inconsistent defenses at trial.⁶⁶

17 Evidence at trial was sufficient to allow Mr. Curry to present an
18 entrapment defense and for the jury to be so instructed. Only slight
19 evidence is necessary for submission of the issue to the jury.⁶⁷ The
20 defendant proposed the Model 9th Circuit Jury Instruction for

23 ⁶⁴ See *Mathews v. U.S.*, 485 U.S. 58 (1988).

24 ⁶⁵ *Mathews v. U.S.*, 485 U.S. 58, 64 (1988). (internal citation omitted)

25 ⁶⁶ *Mathews v. U.S.*, 485 U.S. 58, 64 (1988). (internal citation omitted); See also, *United States v. Demma*, 523 F.2d 981, 982 (9th Cir. 1975); *U.S. v. Spenz*, 653 F.3d 815 (2011).

⁶⁷ See *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003); See also *United States v. Becerra*, 992 F.2d 960, 963 (9th Cir. 1993).

1 Entrapment with additional language addressing the legal issue of
 2 fantasies.⁶⁸ Evidence at trial was legally sufficient for the entrapment
 3 instruction and therefore was required to be given.
 4

5 There was evidence at trial to support the fact that Mr. Curry was not
 6 predisposed to commit the crime prior to initial contact with the
 7 government agents. The Ninth Circuit lays out 5 factors in determining
 8 predisposition.⁶⁹ The first factor asks whether the defendant
 9 demonstrated reluctance. The evidence clearly supports this. For
 10 example, in Exhibit 105, Mr. Curry directly raises his reluctance by
 11 stating, “This will be my first time doing something like this. This isn’t
 12 a setup of any kind right that’s the only thing that’s bugging me”.⁷⁰ Fear
 13 of breaking the law is sufficient evidence of reluctance to commit the
 14 crime. “Predisposition is inseparable from the risk-reward calculation a
 15 person might make. Our criminal-law system assumes that some people
 16 choose not to commit crimes not because they are moral but because the
 17 fear of punishment trumps the hope for reward or pleasure.”⁷¹ “The
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 23 ⁶⁸ See *Model Crim. Jury Instr.* 9th Cir. 5.2 (2022); ECF No. 88 at pg. 25.
 24 ⁶⁹ See *Model Crim. Jury Instr.* 9th Cir. 5.2 (2022); See also *United States v. Thickstun*, 110 F.3d
 1394, 1396-97 (9th Cir. 1997); *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995).
 25 ⁷⁰ See Ex. 105 at Bates 87 (pg. 3 of 7).
 71 *United States v. Anderson*, 55 F.4th 545, 553 (7th Cir. 2022), (citing) *Jacobson*, 503 U.S. at
 551, 112 S.Ct. 1535 (1992).

1 specific reason a defendant was reluctant to commit the offense does not
2 matter. The reason need not be noble or moral. What matters is whether
3 the defendant was reluctant to commit the offense at all.”⁷²
4

5 The second factor is the defendant’s character and reputation. Mr.
6 Curry testified that he had never been convicted of a crime nor engaged
7 in sexual relations with a minor.⁷³ Additionally, multiple officers
8 testified to Mr. Curry not being on their radar (or HSI’s) prior to these
9 incidents. This is sufficient evidence.
10

11 The third factor is whether the government agents initially suggested
12 the criminal activity. The evidence supports this. For example, both
13 Exhibits 104 and 105, establish that Detective Morgan initiated the
14 desire for her daughters to have criminal sexual activity with Mr. Curry.
15 In response to Mr. Curry asking Detective Morgan what she was looking
16 for, she responded, “am a mom of two girls 11 and 13. I grew up in a very
17 close family and my dad took very good care of me and my sister. Im [sic]
18 single and thing [sic] its time for my girls to have the same experience I
19 had growing up. Im [sic] talking about real taboo here so if that’s not for
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25 ⁷² *United States v. Anderson*, 55 F.4th 545, 553 (7th Cir. 2022).

⁷³ See ECF No. 115 at Bates 373, 374 (pg. 12, 13 of 116).

1 you please don't judge and just move on. This is 100% real deal If your
2 truly interest let me know I don't care about you being chubby honey".⁷⁴
3
4 Subsequent to Mr. Curry indicating that he thought she wanted to have
5 sex with him for money and that he was willing to do that, she again went
6 back to criminal sexual activity with her daughters.⁷⁵ This is sufficient
7 evidence. The evidence supports the theory that Mr. Curry was seeking
8 sexual relations with an adult female and it was Detective Morgan that
9 initiated the idea of criminal sexual relations with her daughters.

10
11 The fourth factor is whether the defendant engaged in the criminal
12 activity for profit. There was no evidence presented at trial (nor in
13 existence) to show that Mr. Curry was engaged in the criminal activity
14 for profit. This is sufficient evidence for the instruction.

15
16 Finally, the fifth predisposition factor is the nature of the
17 government's inducement or persuasion. Evidence was presented at trial
18 of the government agent using subtle cues to induce Mr. Curry. For
19 example, the government agent normalizes the criminal behavior.⁷⁶ She
20 suggests to Mr. Curry that this is a good thing. She suggests that she
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25⁷⁴ See Ex. 104 at Bates 158 (pg. 1 of 4).

⁷⁵ See Exs. 104 and 105.

⁷⁶ See Exs. 104 and 105 generally.

1 has done this before and that it is good for her children. She indicates
2 that she and her sister were raised this way and that she wants her
3 daughters to have the same thing that they did. She is normalizing the
4 behavior. When Mr. Curry responds, he indicates that he is willing to
5 help her out. In addition, it is clear that Mr. Curry is an insecure, lonely
6 person. Detective Morgan makes it clear that she doesn't mind that he
7 is chubby. She tells him he looks like a sweetheart when he sends her
8 his picture. She uses terms of affection such as "hun" and "sweetheart."
9 Likewise, she knows that he is seeking sexual intercourse with an adult.
10 She uses the promise of the reward of sexual intercourse (and relations)
11 to steer Mr. Curry into criminal sexual activity with her daughters. All
12 of this is packaged in a form of inducement and persuasion. This is
13 sufficient evidence.

14 Additionally, there was evidence presented to support the theory that
15 the government's conduct created a substantial risk that an otherwise
16 innocent person would commit an offense. A person's inclinations and
17 fantasies are beyond the reach of the government and are not to be
18

1 considered evidence of predisposition.⁷⁷ There is evidence supporting the
2 theory that Mr. Curry's fantasies turned into actions based on the
3 government's conduct.
4

5 Finally, without the jury being instructed in regards to an entrapment
6 defense it is the position of the defendant that the Final Instruction No.
7 9A should not have been given. This likely had an impact on the jury's
8 conclusion without them being provided with the necessary
9 counterbalance of an entrapment instruction. The jury was only given
10 an instruction for the government's half of the argument and not the
11 defendant's. In closing, the government was able to utilize the
12 instruction (and Court's authority) to argue it's theory of guilt while the
13 defendant was prohibited from utilizing an entrapment
14 instruction/defense in arguing his theory of the case to the jury which he
15 was legally entitled to do.
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18 In the interest of justice, Mr. Curry requests the granting of a new
19 trial.
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22 CONCLUSION 23 24

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77 *Jacobson v. U.S.*, 503 U.S. 540, 552 (1992); (citing) *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *Stanley v. Georgia*, 394 U.S. 557, 565-566 (1969).

This Court should grant Mr. Curry's motion for a judgment of acquittal, vacate the jury's verdict as to both counts, and dismiss the indictment. Alternatively, this Court should grant Mr. Curry's motion for a new trial and vacate the jury's verdict because the interests of justice so require. Respectfully submitted.

Dated: February 15, 2024.

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Certificate of Service

I hereby certify that on February 15, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following: Michael D. Murphy, Assistant United States Attorney.

s/ Craig D. Webster
Craig D. Webster